FUYU INTERNATIONAL SDN BHD v. LAI FUI PIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: WA-12BC-7-08-2018]
23 OCTOBER 2019

CONTRACT: *Agreement – Supply of goods – Claim for refund of monies paid – Whether there was implied term in contract that supplier contractually agreed to supply and install marble with thickness of 20mm – Whether contract for supply and installation of marble was sale by sample – Whether contract silent on thickness of marble to be supplied – Whether allowing oral evidence to add term as to thickness of marble into contract in breach of parol evidence rule in s. 92 of Evidence Act 1950 – Whether supplier in breach of terms – Sale of Goods Act 1957, s. 17*

SALE OF GOODS: *Contract – Supply of goods – Claim for refund of monies paid – Whether there was implied term in contract that supplier contractually agreed to supply and install marble with thickness of 20mm – Whether contract for supply and installation of marble sale by sample – Whether contract silent on thickness of marble to be supplied – Whether allowing oral evidence to add term as to thickness of marble into contract in breach of parol evidence rule in s. 92 of Evidence Act 1950 – Whether supplier in breach of terms – Sale of Goods Act 1957, s. 17*

The respondents were the registered proprietors of a house ('premises') and had appointed the appellant to carry out renovation works. At the Sessions Court, the respondents claimed for the refund of, *inter alia*, RM129,850 paid pursuant to quotation for renovation works ('marble contract'). The appellants also counterclaimed for damages. The crux of the dispute between the parties was whether there was an implied term in the marble contract, pursuant to s. 17 of the Sale of Goods Act 1957 ('SOGA'), that the appellant had contractually agreed to supply and install marble with the thickness of 20mm for the renovation works based on the sample marble shown by the appellant to the respondents. The Sessions Court Judge ('SCJ') held that pursuant to s. 17 of the SOGA that there was an implied term in the marble contract based on the sample that the respondents had wanted marble of 20mm thickness to be installed on the ground floor of the premises. The SCJ allowed the respondents' claim for the refunds under the contracts and disallowed the appellant's counterclaim. Thus, the appellant appealed. The appellant contended that the SCJ had erred in law and in fact in concluding that there was an implied term in the marble contract. According to the appellant, the agreed term as stated in the marble contract was 'to supply and install white based grey vein polished marble (1100m x 800m)' and that there was no term in the said contract as to the thickness of the marble. The respondents' case, on the other hand, was that the contract for the supply and

A installation of the marble was a sale by sample and there was an implied term that the thickness of the marble to be supplied and installed at the premises was 20mm. It was the respondents' argument that according to s. 17 of the SOGA, there was an implied term that the marble to be supplied must be in accordance with the sample shown to the respondents, and not according to
B the express terms written in the marble contract.

Held (allowing appeal; setting aside decision of Sessions Court; remitting matter to Sessions Court for quantification of appellant's damages for respondents' breach of contract):

C **(1)** In a sale by sample, s. 17(1) of the SOGA requires that the sample form part of a contractual promise by the seller, either expressly or impliedly. In order to ascertain whether there was a contract for sale by sample, it must first be ascertained whether the seller had made an express or implied promise that the goods sold will conform with the sample. In this instant case, there was no express provision in the marble contract
D that the sale of the marble was a sale based on the sample shown to the respondents. Neither was there any express term that the marble to be supplied must be 20mm in thickness. (paras 23-25)

(2) In determining whether there was an implied condition pursuant to s. 17 of the SOGA that the sale of the marble for installation at the premises
E was a sale by sample, the applicable test was the ordinary objective test in order to determine 'whether a reasonable person with full background knowledge of the transactions would understand that the seller was making a binding promise that the goods would conform to the sample.' (para 27)

F **(3)** The contract was silent on the thickness of the marble to be supplied. The facts showed that the quotation for the supply and installation of marble was documented on the original marble quotation, and was revised twice thereafter on the first revision of the original marble quotation and the marble contract. Nowhere in the original marble
G quotation or in the revisions to the quotation and marble contract was the thickness of the marble documented. If the thickness of the marble of 20mm was an important term to the respondents for the contract for the supply and installation of the marble, R1 when he manually amended the original marble quotation, would have manually amended
H the quotation to include the thickness of the marble to 20mm. (paras 31, 46 & 48)

I

(4) Whether or not the respondents could afford to buy marble as in the sample shown was not a relevant factor in determining whether the sale of the marble was a sale by sample and whether there was a promise made by the seller that the marble would conform to the sample in terms of thickness. For a contract to be a sale by sample, the term that it was a sale by sample must be expressly written in the contract. The mere fact that the appellant had passed the sample to the respondents did not mean that the sale of the marble was sale by sample. (paras 50, 51 & 54)

(5) The respondents had terminated the marble contract not because the appellant had delivered the bulk of the marble and they had found that the bulk did not correspond in quality with the sample or that it was unmerchantable. They had asked for a refund of the deposit they had paid under the contract after hearing one of the workers of the appellant telling the marble installation worker that he must have enough cement to install marble of 15mm thickness and they had proceeded to terminate the contract when the appellant did not refund the deposit as demanded by the respondent. With the respondents having terminated the marble contract before the bulk of the marble was supplied and without the respondents having inspected the bulk, it was impossible for a court to find that the bulk of the marble did not correspond with the sample in quality or that the marble to be supplied were defective rendering them unmerchantable. (paras 70 & 71)

(6) It was plainly wrong for the SCJ to hold that there was an implied condition in the marble contract pursuant to s. 17 of the SOGA without first determining that the said contract was a contract for sale by sample. It was also wrong of the SCJ to allow R1's oral evidence to add a term as to the thickness of the marble into the marble contract in breach of the parol evidence rule in s. 92 of the Evidence Act 1950. It was incorrect to hold that the terms implied into a contract by s. 17 of the SOGA was that the buyer had actually wanted the goods to be supplied of a particular thickness and that the buyer could afford to purchase the goods of that thickness that he wanted. (paras 72 & 73)

(7) Since the respondents had terminated the marble contract before the appellants delivered the bulk of the marble, no comparison could have been made between the bulk and the sample. It followed that without a comparison being made between the bulk of the marble and the sample, it was factually and legally impossible for the SCJ to determine whether the appellant was in breach of a term implied by s. 17 of the SOGA into the contract. Hence, it was plainly wrong for the SCJ to find that the appellant had breached the term implied into the marble contract by s. 17 of the SOGA. (para 76)

Case(s) referred to:

Champanhac & Co Ltd v. Waller & Co Ltd [1948] 2 All ER 724 ***(refd)***
Compact Metals Industries Ltd v. PPG Industries (Singapore) Ltd [2006] SGHC 242 ***(refd)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Gardiner v. Gray (1815) 4 Camp 144 ***(refd)***
James Drummond and Sons v. EH Van Igren & Co Ltd (1887) 12 App Cas 284 ***(refd)***
LG Thorne & Co v. Thomas Borthwick & Sons (Asia) Ltd (1956) 56 SR (NSW) 81 ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***
Re Faulkners Ltd (1917) 38 DLR 84 ***(refd)***
Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
W & J Sharp v. Thomson [1939] 3 DLR 695 ***(refd)***
Wasco Lindung Sdn Bhd v. Lustre Metals & Minerals Sdn Bhd [2015] 2 CLJ 427 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92
Sale of Goods Act 1957, s. 17(1), (2)(a), (b), (c)

Sale of Goods Act 1979 [UK], s. 15(1), (2)

Other source(s) referred to:

Abdul Majid Nabi Baksh and Krishnan Arjunan, *Sale of Goods Law in Malaysia*, Sweet & Maxwell, 2016, para 3.084
Benjamin's Sale of Goods, 9th edn, Sweet & Maxwell, 2014, para 11-075

For the appellant - Wong Kam Leong & Lai Jin Shawn; M/s Tee, Liew & Co
For the respondents - Amanda Farhana Roslaini; M/s SN Fam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is Fuyu International Sdn Bhd's ("appellant") appeal against the decision of the learned Sessions Court Judge ("SCJ") in allowing the respondents' claim and disallowing the appellant's counter-claim. The appellant was the defendant and the respondents were the plaintiffs at the Sessions Court.

[2] The respondents are the registered proprietors of a house located on No. 5, Jalan DU 6/3, Ambrosia @ Kinrara Residence, Taman Damai Utama, 41780 Puchong, Selangor ("premises"). They had appointed the appellant to carry out renovation works at the premises.

[3] At the Sessions Court, the respondents claimed for the refund of the following sums:

(a) RM159,556.29 paid pursuant to Quotation for Renovation Works Contracts No. 16/CT/FISB043R1 dated 19 October 2016 ("renovation works contract");

(b) RM129,850 paid pursuant to Quotation for Renovation Works Contracts No. 16/CT/FISB056-Rev2 dated 9 November 2016 ("marble contract"); and

(c) RM9,632.54 paid pursuant to Quotation for Renovation Works Contracts No. 16/CT/FISB059-Rev2 dated 9 November 2016 ("electrical works contract").

and the appellant counterclaimed for the following sums:

(a) RM616,986.47 being special damages;

(b) RM167,502.30 being profit for renovation works; and

(c) RM15,868 and RM47,101 for design works.

[4] The crux of the dispute between the parties at the Sessions Court was whether there was an implied term in the marble contract, pursuant to s. 17 of the Sale of Goods Act 1957, that the appellant had contractually agreed to supply and install marble with the thickness of 20mm for the renovation works based on the sample marble shown by the appellant to the respondents.

[5] The learned SCJ held that pursuant to s. 17 of the Sale of Goods Act 1957, there was an implied term in the marble contract based on the sample that the respondents had wanted marble of 20mm thickness to be installed on the ground floor of the premises.

[6] Based on this finding of fact, the learned SCJ allowed the respondents' claim for the refunds under the contracts and disallowed the appellant's counterclaim.

[7] The appellant appealed against the SCJ's decision. For the reasons stated in this judgment, I found that the learned SCJ was plainly wrong in holding that there was a term implied in the marble contract pursuant to s. 17 of the Sale of Goods Act 1957 that the respondent had wanted marble of 20mm thickness. For this reason, I allowed the appellant's appeal.

[8] The full grounds for my decision are set-out in this judgment.

Appellant's Case

[9] The appellant contended that the learned SCJ had erred in law and fact in concluding that there was an implied term in the marble contract that the appellant is to supply and install marble flooring at the thickness of 20mm.

[10] It is the appellant's case that the agreed terms as stated in the marble contract is "to supply and install white-based grey vein polished marble (1100m x 800m)". There is no term in the said contract as to the thickness of the marble.

[11] The appellant also contends that there is no evidence produced by the respondents during the trial at the Sessions Court that upon or prior to the issuance of the marble contract, the appellant had proposed or agreed to supply and install marble flooring at the thickness of 20mm in the premises.

Respondents' Case

[12] The respondents' case is that the contract for the supply and installation of the marble was a sale by sample and there was an implied term that the thickness of the marble to be supplied and installed at the premises was 20mm.

[13] They argue that according to s. 17 of the Sale of Goods Act 1957, there is an implied term that the marble to be supplied must be in accordance with the sample shown to the respondents, which had a thickness of 20mm, and not according to the express terms written in the marble contract.

Facts

[14] The marble contract states the size and the colour of the marble to be supplied and installed. The relevant provisions of the marble contract are reproduced below:

Description	Unit Price	Amount (RM)
To supply and install white-based grey vein polished marble (1100m x 800mm) Dimension 135 sqm	260,000.00 Discount -15,000.00	245,000.00
	Sub Total (RM)	245,000.00
	6% GST	14,700.00
	Grand Total including GST (RM)	259,700.00

Terms and conditions

Price Prices quoted are according to the specification provided only. Total price quoted is according to items stated, additional item(s) will be charged accordingly. All prices are subjected to 6% GST.

…

[15] It is not disputed that there was no express term in the marble contract that the marble to be supplied is to be 20mm in thickness.

[16] The learned SCJ held that there was an implied contract under s. 17 of SOGA 1957 because based on the sample, it is clear that the plaintiffs wanted marble with the thickness of 20mm to be installed on the ground floor of the premises and on this basis the learned SCJ allowed the respondents' claim for a refund of the deposits paid and dismissed the appellant's counterclaim.

Appellate Intervention

[17] It is trite law that an appellate court should not set aside the decision of a court below unless the judge in the court below was plainly wrong: see Federal Court's judgments in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 and *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064; [2014] MLJU 1906; [2015] 1 AMR 575.

The Sale of Goods Act 1957

[18] The Sale of Goods Act 1957 (Revised 1989) (Act 382) ("SOGA 1957"), s. 17 reads as follows:

> **17. Sale by sample**
>
> (1) A contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect.
>
> (2) In the case of a contract for sale by sample there is an implied condition:
>
> (a) that the bulk shall correspond with the sample in quality;
>
> (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
>
> (c) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

[19] The wordings in s. 17 of SOGA 1957 is based on the UK's Sale of Goods Act 1893 and is the same as s. 15(1) and (2) of the UK's Sale of Goods Act 1979 (before it was revised by the UK's Sale and Supply of Goods Act 1994 and the Consumer Rights Act 2015).

[20] Section 17(1) of SOGA 1957 (and s. 15(1) of the UK Sale of Goods Act 1979) states that "a contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract." There is no definition in either statute of the phrase of a "sale by sample".

[21] Learned authors of academic texts in discussing what is "sale by sample" all refer to the classic statement by Lord Macnaghten in the House of Lords' case of *James Drummond and Sons v. E.H. Van Igren & Co. Ltd* (1887) 12 App Cas 284, where His Lordship said:

> After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words.

[22] In the English case of *Champanhac & Co Ltd v. Waller & Co Ltd* [1948] 2 All ER 724, Slade J said that:

> one may describe goods which one is selling by giving expression to the colour, class, nature, quality or type, or one can say in effect: 'I am not very good at expressing myself, and in any case I may leave something out. This is the type of goods that I am offering to sell you' – producing a sample.
>
> …
>
> [It is] an offer to sell goods the bulk of which will conform to the description which is conveyed to the buyer's mind by his being tendered the sample.

[23] In a sale by sample, s. 17(1) of SOGA 1957 requires that the sample form part of a contractual promise by the seller, either expressly or impliedly. As explained by M.G. Bridge in *The Sale of Goods*[1], it is not every time that a sample is displayed that the contract for the sale of the goods takes place under s. 15 of the UK Sale of Goods Act 1979. He says:

> The proffering of a sample therefore amounts to a non-verbal demonstration of the goods that the buyer may expect to receive; it mutely describes them. *It is not everytime that a sample is displayed that the contract takes place under section 15. The seller must expressly or impliedly undertake that the bulk will relate to the sample in the way provided for in section 15.* Consequently, a sale by sample takes place where there is an express or implied term of the contract to that effect. (emphasis added)

[24] Therefore, in order to ascertain whether there was a contract for sale by sample, it must first be ascertained whether the seller had made an express or implied promise that the goods sold will conform with the sample.

Was There An Express Or Implied Term In The Marble Contract That The Sale Of The Marble Was A Sale By Sample?

[25] In this instant case, there is no express provision in the marble contract that the sale of the marble is a sale based on the sample shown to the respondents. Neither was there any express term that the marble to be supplied must be 20mm in thickness.

[26] What is the applicable test in ascertaining whether the seller promised that the goods sold would conform to the sample shown? According to Paul Mitchell in the chapter on *Implied Terms as to Quality and Sample* in the book *Sale of Goods*[2], the applicable test is the ordinary objective test:

> In order to decide whether the seller promised that the goods would correspond with the sample, one must look at the intentions of the parties to the contract. *Those intentions are ascertained by applying the ordinary objective test. Under this test, the decisive question is whether a reasonable person with full background knowledge of the transactions would understand that the seller was making a binding promise that the goods would conform to the sample.*
>
> (emphasis added)

[27] Therefore, in determining whether there is an implied condition pursuant to s. 17 of SOGA 1957 that the sale of the marble for installation at the premises is a sale by sample, this court has to look at the evidence before the Sessions Court and apply the objective test in order to determine "whether a reasonable person with full background knowledge of the transactions would understand that the seller was making a binding promise that the goods would conform to the sample."[3]

[28] In the English case of *Gardiner v. Gray* (1815) 4 Camp. 144, 171 ER 46, the buyer negotiated with the seller for the purchase of several bags of waste silk. The seller showed the buyer a sample. The sale note was recorded as "12 bags of waste silk sold at 10s 6d per lb" without referring to the samples or specifying particularly the quality of the commodity. The silk was purchased in London, and sent down to the defendant at Manchester. On its arrival there, it was examined, and found to be much inferior to the samples, and of a quality not saleable under the denomination of "waste silk." Lord Ellenborough held that there had been no promise that the goods would correspond to the sample since the written contract did not contain any stipulation that it was a sale by sample and that such stipulation cannot be added into the contract by oral testimony. His Lordship held:

> I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity.

[29] In *Wasco Lindung Sdn Bhd v. Lustre Metals & Minerals Sdn Bhd* [2015] 2 CLJ 427; [2014] AMEJ 1307; [2015] 9 MLJ 610, contemporaneous emails between the seller and buyer showed that the seller would supply the buyer with a sample of 500g of aluminium ingot for testing. The emails between the parties made it clear that the plaintiff would only buy the aluminium ingots if the test of the sample revealed that the goods were satisfactory. The

buyer tested the sample of ingot and found it to be satisfactory. It then contracted to purchase from the seller aluminium ingots at a price of US$679,000 to be delivered in two batches. When the first batch arrived at Port Klang, it was discovered that the containers contained white powder instead of aluminium ingots. The High Court held since the purchase of the aluminium ingots was premised on the suitability of the ingots based the testing of the 500g sample, there was an implied condition under s. 17(2)(a) of SOGA 1957 that the goods received by the buyer would correspond with the sample of the aluminium ingot given by the seller to the buyer.

[30] In this instant case, the marble sample passed by Zoe Ee Hui Ping ("SD4") of the appellant to the second respondent ("R2") over the gate of the respondents' house was a "white based grey vein polished marble" measuring 190mm (length) x 90mm (width) x 20mm (thick). The length and width of the marble expressly stated in the marble contract was 1100m x 800mm. The stated length of the marble is clearly incorrect as it cannot be the intention of the parties that the length of each of marble slabs to be supplied and installed (even if it was possible to cut each slab at that length) is 1100m, which is equal to 1.1km! However, neither party raised this as an issue during the trial at the Sessions Court. The learned SCJ also did not address it in his judgment.

[31] The contract is silent on the thickness of the marble to be supplied. Nowhere was it stated in the marble contract that the marble was to be 20mm thick. After the marble contract was signed, at the first respondent's ("R1") request for larger sized marble slabs in order to minimise the joints, the size of the marble slabs to be supplied were changed to larger square slabs of 1302mm x 1302mm each. R1 had asked Zoe to indicate on the floor plans the change in size of the marble. Again, there was no mention of the 20mm thickness of the marble in the floor plan.

[32] R1 testified that before the contract was entered, the respondents had specifically demanded that the thickness of the marble to be 20mm and that Lim Wei Wei ("SD3") had represented to the respondents that the appellant has the stock of marble with 20mm thickness to be supplied and installed in the premises. R1 said that relying on the representation made by Lim Wei Wei, the respondents entered into the marble contract.

[33] Lim Wei Wei of the appellant in her testimony disagreed that R1 had at any time before the entering of the marble contract had demanded for marble with the thickness of 20mm to be installed.

[34] Dato' Lim Thean Seng ("SD2") of the appellant said that the marble sample merely served to show the colour of the marble. He said that the sample was not to illustrate the actual dimensions of the marble because if it were so, the sample would have measured 1100mm in length and 800mm in width as per the marble contract (and not 190mm in length and 90mm in width as per the sample).

[35] Dato' Lim testified that R1 first wanted "Calacatta gold" marble, a white-based marble with gold veins. The price of "Calacatta gold" marble is very expensive in Malaysia so Dato' Lim and Lim Wei Wei went specially to China to source the marble. However, they found out that even in China that the "Calacatta gold" marble was expensive. After they told R1 the price, he rejected the "Calacatta gold" marble and settled for a normal colour marble. Dato' Lim and Wei Wei then brought a variety of marble samples from China for the respondents to consider. R1 and R2 rejected all the samples from China after viewing them. Thereafter, on 1 October 2016, Dato' Lim and Wei Wei took R1 to marble and tile shops on Jalan Ipoh to try to find white marble with fine or minimal grey veins. They were unable to find such marble during the visit to the shops on Jalan Ipoh. At no time did R1 ask for Italian marble from the shops on Jalan Ipoh. All he asked for was the colour of the marble and he was informed that it was not easy to find the white marble he was looking for in Malaysia and even if found, the white marble would be expensive.

[36] R1 then instructed Wei Wei to source the white marble from China. Wei Wei checked with one of the marble suppliers she and Dato' Lim had met during their earlier visit to China to enquire whether they had the white marble. She sent the supplier a photo of an artificial marble as a sample of colour. The supplier in China confirmed that they do have such white marble, which is called "Jazz White" and sent the appellant a sample of the "Jazz White" marble, which it received on 13 October 2016. Zoe Ee, the appellant's interior designer cum project manager, then passed the sample of the "Jazz White" marble to R2 over the gate of her house.

[37] The learned SCJ on p. 12 of his judgment erroneously said that the sample "P1" was "Calacatta Gold" even though the evidence shows that it was not "Calacatta Gold" but a "white based grey vein polished marble".

[38] Based on the size of the ground floor of the premises, the supplier in China suggested that the marble to be cut into 1100mm x 800mm slabs, which was the best size cut from the block of marble on a less wastage basis to save costs. The supplier sent the appellant their quotation together with a colour photograph of the white marble on 25 October 2016.

[39] After receiving the supplier's quotation, the appellant calculated their costs which included installation charges and their profit and informed R1 the price. At R1's request, the appellant gave the respondents a discount of RM10,000. Wei Wei then prepared a formal quotation (Contracts No. 16/CT/FISB056) dated 29 October 2016 ("original marble quotation") for the marble order of 1100mm x 800mm size of white marble with grey veins enclosing a photograph of the marble received from the supplier in China. The amount of quoted for the supply and installation of the marble was RM265,000.

[40] On 4 November 2016, R1 manually revised the price on the original marble quotation by reducing the price by another RM5,000. He signed and returned the revised original marble quotation to the appellant. When R1 signed the original marble quotation he did not comment on the size of the marble slabs to be supplied or the fact that the length of each marble slab was 1100m instead of 1100mm. He also did not ask for the thickness of the marble to be added to the terms of the marble contract. The respondents did not pay the requisite 50% deposit when they returned the signed quotation.

[41] Dato' Lim said that after receipt of the signed original marble quotation from the respondents, he and Wei Wei left for China on 5 November 2016 to verify whether the supplier's marble was of the correct colour and truly available. Dato' Lim said if the marble was available, the appellant wanted to immediately pay for the marble in order to secure the purchase on behalf of the respondents even though it was uncommon for them to make such payment when no deposit has been received from the customer.

[42] On or about 9 November 2016, at R1's request, the appellant sent the respondents a new type-written quotation incorporating R1's handwritten revision to the discount. However, after receiving the Quotation for Renovation Works Contracts No. 16/CT/FISB056-Rev2 dated 9 November 2016 (referred to in this judgment as the "marble contract"), R1 changed his mind and said that he wanted to change the size of the marble from the agreed rectangular size to a larger size and square in shape. Wei Wei then discussed with the supplier in China about R1's request. She said that after the supplier had done the measurement, the supplier informed her that he was able to cut the marble at a maximum of size of 1301mm x 1301mm slabs. She testified during the trial at the Sessions Court that "in the hope of maintaining a good relationship with the plaintiffs and not wanting any further discussion that will change in the planned work schedule, and since the cost was still bearable, we decided to absorb the extra costs and not charge extra to the plaintiffs."

[43] Wei Wei then instructed Zoe to redo the floor plan in light of the change in the dimensions of the marble slabs to be laid. On or about 10 November 2016, Zoe collected the signed marble contract from the respondents and received a 50% deposit payment of RM129,850. On 14 November 2016, Zoe brought the amended marble layout drawing for the ground floor to R1. R1 instructed Zoe to indicate in her handwriting on the plan the amended size of the marble slabs. She wrote the amended size of the slabs and signed the revised plan. The signed plan indicated that the size of the marble as 1302mm x 1302mm as the extra 1mm was to take into account the joints which would be the cement and glue all around the slabs.

[44] Zoe testified that she went to the premises on 21 November 2016 with the marble laying worker. She said that she started to instruct the worker that the marble that he would be laying had a thickness of 15mm and that he is to buy sufficient cement for this thickness. She said that the respondents started to shout at her saying that the appellant was not supplying the marble according to the size contracted for. Zoe said "I was stunned for a moment and very surprised for we were acting according to the terms of the marble contract and the thickness of the marble slab was never raised before this between the plaintiffs and us." She said that she thought it best for the respondents called Wei Wei but the respondents refused to speak to Wei Wei and kept insisting that the appellant had breached the marble contract and that it was to refund the deposit to them.

[45] R1 in his evidence in chief had testified that Wei Wei had sent him a WhatsApp message on 13 October 2016 at 3.36pm attaching a photo of the marble sample. Subsequently, Wei Wei and Lim Pei Pei of the appellant brought a marble sample to show R1 and R2. The marble sample given to R1 was a "White Based Grey Vein Polished Marble" measuring 190mm (length) x 90mm (width) x 20mm (thick). The marble sample was tendered at trial and marked as exh. "P1".

[46] The facts show that the quotation for the supply and installation of marble was documented on the original marble quotation, and was revised twice thereafter on the first revision of the original marble quotation and the marble contract. Additionally, R1 had asked for the length and width of the marble be revised from rectangular slabs of 1100mm x 800mm to larger square slabs. R1 had asked Zoe to document the changes in the size of the slabs on the appellant's marble floor plan. Nowhere in the original marble quotation or in the revisions to the quotation and marble contract was the thickness of the marble documented. There is no evidence to show that R1 had asked Zoe to indicate on the appellant's marble plan the thickness of the marble. The facts show that R1 only asked her to notate the change in the length and width of the marble slabs on the marble plan.

[47] I find that R1's testimony contradicts with the facts of the case as evidenced by the original marble quotation dated 4 November 2016 signed by R1 and the revision that R1 made to the original marble quotation on 9 November 2016, which resulted in the marble contract. It also contradicts with his further revision to the size of the marble slabs from rectangular slabs of 1100mm x 800mm to square slabs, which were indicated on the amended floor plan as 1302mm x 1302mm after the marble contract had been signed and the 50% deposit paid.

[48] If the thickness of the marble of 20mm was an important term to the respondents for the contract for the supply and installation of the marble, R1 when he manually amended the original marble quotation on 9 November 2016, would have manually amended the said quotation to include the thickness of the marble to 20mm. Additionally, when he instructed Zoe to document the changes in the size of the marble on the amended floor plan, he would also have instructed her to write on the floor plan that the thickness of the marble is 20mm.

[49] Nevertheless, the learned SCJ in his judgment said that he found that the testimony of the respondents' witnesses was more consistent and probable than the appellant's witnesses. He held that the respondents' testimony shows that the respondents wanted marble with the thickness to be installed in the said premises. He also held that the respondents could afford to order marble as in exh. P1. The relevant excerpt of his judgment is reproduced below:

> Mahkamah mendapati keterangan saksi-saksi plaintif adalah lebih konsisten dan "probable" dari keterangan saksi-saksi defendan. Keterangan plaintif menunjukkan plaintif sememangnya berkehendak kepada marmar setebal 20mm tersebut dipasang dipremis tersebut. Plaintif juga adalah berkemampuan untuk menempah marmar sebagai ekshibit P1.

[50] With respect to the learned SCJ, whether or not the respondents can afford to buy marble as in the sample shown is not a relevant factor in determining whether the sale of the marble was a sale by sample and whether there was a promise made by the seller that the marble will conform to the sample in terms of thickness. The factors that he should have taken into account was (i) whether the parties had agreed that the sale of the marble was a sale by sample; and if the answer is in the affirmative, (ii) whether the parties had agreed that the thickness of the marble was to be 20mm.

[51] For a contract to be a sale by sample, the term that it is a sale by sample must be expressly written in the contract. The authors of the book *Sale of Goods Law in Malaysia*[4] explained this legal principle as follows:

> Generally, for a sale to fall within the ambit of s. 17, there must be a term in the contract, express or implied, to the effect that the sale is by sample. The mere production or display of a sample during negotiations does not, of itself, make the sale one by sample. *If the negotiations culminate in a written contract, the term that it is a sale by sample must be in a written document. Without such a written clause, where the written contract is the entire contract between the parties, the parol evidence rule (as contained in s. 92 of the Evidence Act 1950) would apply. In such a contract, the parol evidence rule would preclude the admission of any evidence extrinsic to the writing to show that the parties had orally agreed that the sale was to be a sale by sample.* (emphasis added)

[52] They refer to the case of *LG Thorne & Co v. Thomas Borthwick & Sons (Asia) Ltd* (1956) 56 SR (NSW) 81, where Street CJ held that where the contract was reduced in writing, the writing constituted the whole contract between the parties and that no parol evidence was admissible to show that the sale was meant to be a sale by sample.

[53] The authors of *Benjamin's Sale of Goods*[5] referring to, among others, the cases of *Gardiner v. Gray* (1815) 4 Camp. 144; *Re Faulkners Ltd* (1917) 38 DLR 84; *W & J Sharp v. Thomson* [1939] 3 DLR 695; *Compact Metals Industries Ltd v. PPG Industries (Singapore) Ltd* [2006] SGHC 242, explained that:

> *The mere fact, however, that a sample is exhibited during negotiations for a sale does not necessarily mean that the sale is a sale by sample: it is only such if the contract made is for goods in agreement with the sample.* Frequently samples are displayed to give no more than some indication of the nature of the goods offered. (emphasis added)

[54] As held in the case laws above and as explained by the authors of *Benjamin's Sale of Goods*, the mere fact that Zoe of the appellant had passed the sample to R2 does not mean that the sale of the marble was a sale by sample. In this instant case, the learned SCJ should have first decided whether the contract for the supply and installation of the marble was a sale by sample. Instead, he went ahead to rule that the respondents' oral evidence shows that they actually wanted marble with a thickness of 20mm.

[55] Additionally, the learned SCJ's acceptance of R1's oral testimony which had the effect of adding an additional term to the written marble contract that the thickness of the marble to be supplied under the said contract was 20mm was contrary to the parol evidence rule in s. 92 of the Evidence Act 1950.

[56] The main provisions in s. 91 and s. 92 of the Evidence Act 1950 is reproduced below:

> 91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document
>
> *When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document,* and in all cases in which any matter is required by law to be reduced to the form of a document, *no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself,* or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> …

92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, *no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:*

… (emphasis added)

[57] Augustine Paul FCJ in his book *Evidence: Practice and Procedure*, 4th edn, explains s. 91 and s. 92 of the Evidence Act 1950 as follows:

Sections 91 to 99 of the Act deal with the exclusion of oral by documentary evidence. This section [91] requires the production of the document itself for proof of its contents. It is regarded as embodying the common law rule that where a contract has been reduced in writing it is the writing that must be looked at for the whole of the terms made between the parties (see *Tractors Malaysia Sdn Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 (FC)). The section therefore represents the "best evidence" rule. Section 92 of the Act comes into operation after the document has been produced for the purpose of excluding evidence of oral evidence or statement to contradict, vary, add to or subtract from its terms. Both sections supplement each other. They must be read with section 144 of the Act.

[58] In this instant case, the marble contract had been produced in the Sessions Court during the trial. It states that the appellants are "To supply and install white-based grey vein polished marble (1100m x 800mm) Dimension 135 sqm". It does not state that the sale of the marble is a sale by sample. Neither does it state that the thickness of the marble to be supplied and installed is 20mm.

[59] During the trial, R1 agreed and admitted that there are no documents relating to marble of "20mm" thickness. Additionally, R3 testified that he was not involved in the quotation relating to the marble. He said that the signature on the marble contract was his mother's, R2. However, R2 did not testify during the trial as to thickness of the marble agreed between the parties.

[60] Pursuant to s. 91 of the Evidence Act 1950, the marble contract represents the "best evidence" of the contract between the appellant and the respondents. As held by Augustine Paul JC (as he then was) in *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421; [1997] 4 MLJ 329:

it is after a document has been produced to prove its terms under s. 91 of the Evidence Act 1950, the provisions of s. 92 of the Act comes into operation to exclude evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms.

[61] Salleh Abas FJ (as he then was) in *Tan Chong & Sons Motor Co (Sdn) Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394; [1983] 1 MLJ 220 held that: A

> There is this rule of evidence contained in section 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of the written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section. B

[62] Nothing in the learned SCJ's judgment showed that he had considered whether R1's oral evidence fell within the provisos or illustrations of s. 92 of the Act before ruling that R1's oral evidence is admissible in adding to the C marble contract a new term that the thickness of the marble to be supplied and installed was 20mm.

[63] I find that the learned SCJ in adding a new term into the written contract based on R1's oral evidence even though the said oral evidence did not fall within the provisos or illustrations of s. 92 of the Evidence Act 1950, D had clearly erred in law.

[64] Additionally, the learned SCJ without ruling that the marble contract was a sale by sample, made a finding that based on the sample and R1's oral evidence, the respondents wanted marble with the thickness of 20mm to be installed in the premises. He held there was an implied contract under s. 17 E of SOGA. He said:

> Sampel marmar yang dikehendaki oleh plaintif telah ditunjukkan oleh defendan ialah setebal 20mm sebagaimana di Ekshibit P1. Oleh yang demikian, wujud kontrak yang tersirat dibawah Seksyen 17 Sale of Goods Act 1957. Ini adalah kerana berdasarkan contoh dalam ekshibit P1, F plaintif-plaintif dengan jelasnya inginkan marmar setebal 20mm tersebut untuk dipasang di tingkat bawah premis tersebut.

[65] Once a contract is a sale by sample, s. 17(2)(a) of SOGA 1957 stipulates that the bulk must correspond with the sample in quality. Additionally, it is implied pursuant to s. 17(2)(b) and (c) respectively that the G buyer shall have a reasonable opportunity of comparing the bulk with the sample and that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

[66] It was not the respondents' pleaded case before the Sessions Court that H they did not have any reasonable opportunity to inspect the bulk of the marble to be supplied with the sample. Neither was it their pleaded case that the bulk of the marble did not correspond with the sample in terms of quality or that the marble was not free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of I the sample.

[67] The facts show that on 21 November 2016, R1 and the other respondents started shouting at Zoe Ee when she told the marble installation worker that he will be laying marble of 15mm thickness and that he is to have enough cement to lay marble at that thickness. Then on 5 December 2016, R1 wrote a letter to the appellant asking for it to refund the sum of RM129,850 under the marble contract. Then on 20 December 2016 the respondents' solicitor demanded that the appellant refund the moneys under the marble contract and on 9 January 2017, the respondents wrote a letter to terminate the marble contract and to be refunded the sum of RM129,850.

[68] From the plain and ordinary reading of s. 17(2) of SOGA 1957, it is clear that the conditions implied in the sale of goods by sample are the following:

(i) the bulk of the goods supplied will correspond with the sample;

(ii) the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(iii) the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample

[69] The respondents never inspected the bulk of the marble to be supplied and installed pursuant to marble contract before terminating the said contract. There was no bulk marble delivered prior to the termination as the respondents had terminated the marble contract before the appellant could deliver the bulk of the marble.

[70] The facts show that the respondents had terminated the marble contract not because the appellant had delivered the bulk of the marble and they had found that the bulk does not correspond in quality with the sample or that it was unmerchantable. They had asked for a refund of the deposit they had paid under the contract after hearing Zoe telling the marble installation worker that he must have enough cement to install marble of 15mm thickness and they had proceeded to terminate the contract when the appellant did not refund the deposit as demanded by the respondents through their solicitor.

[71] With the respondents having terminated the marble contract before the bulk of the marble was supplied and without the respondents having inspected the bulk, it is impossible for a court to find that the bulk of the marble does not correspond with the sample in quality or that the marble to be supplied were defective rendering them unmerchantable.

[72] For these reasons, it was plainly wrong for the learned SCJ to hold that there was an implied condition in the marble contract pursuant to s. 17 of SOGA 1957 without first determining that the said contract was a contract for sale by sample. It was also wrong for him to allow R1's oral evidence

to add a term as to the thickness of the marble into the written marble contract in breach of the parol evidence rule in s. 92 of the Evidence Act 1950.

[73] Moreover, in holding that the term implied pursuant to s. 17 of SOGA 1957 was that the respondents wanted marble of 20mm thickness to be installed on the ground floor of the premises, the learned SCJ overlooked that on the plain and ordinary reading of s. 17(2) of the Sale of Goods Act 1957, the terms implied by the said section into a contract for a sale by sample, are that (i) the quality of the bulk of goods supplied corresponds with the quality of sample of the goods shown; (ii) the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (iii) the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. It was incorrect to hold that the terms implied into a contract by s. 17 of SOGA 1957 was that the buyer had actually wanted to the goods to be supplied of a particular thickness and that the buyer can afford to purchase the goods of that thickness that he wanted.

[74] Above all, even if the marble contract was a sale by sample and even if the respondents' oral evidence fell within one of the exceptions or illustrations in s. 92 of the Evidence Act 1950, the learned SCJ was manifestly wrong to hold that the appellant had breached the terms implied by s. 17 of SOGA 1957 since the bulk of the marble had not yet been delivered at the time of the respondent's termination of the contract.

[75] In all cases relating to sale by sample, the courts have made findings on whether the bulk of the goods delivered corresponds with the sample and whether they are merchantable. If the bulk of the goods delivered does not correspond with the sample or is unmerchantable, the Malaysian courts held that the seller had breached s. 17 of SOGA 1957 as did the English courts under the equivalent provision under the UK's Sale of Goods Act 1979 or Sale of Goods Act 1863.

[76] In this instant case, since the respondents had terminated the marble contract before the appellant delivered the bulk of the marble, no comparison could have been made between the bulk and the sample. It follows that without a comparison being made between the bulk of the marble and the sample, it was factually and legally impossible for the learned SCJ to determine whether the appellant was in breach of a term implied by s. 17 of SOGA 1957 into the contract. Hence, it was plainly wrong for the learned SCJ to find that the appellant had breached the term implied into the marble contract by s. 17 of SOGA 1957.

A **Decision**

[77] For all these reasons, I find that the High Court must intervene in the decision of the Sessions Court. Accordingly, the appellant's appeal is allowed.

B **[78]** The decision of the Sessions Court is hereby set aside and the matter is remitted to the Sessions Court for quantification of the appellant's damages for the respondents' breach of contract.

[79] Costs of RM15,000 is awarded to the appellant for this appeal and is payable by the respondents to appellant subject to the payment of the C allocatur fee.

Endnotes:

1. *The Sale of Goods*, 3rd edn, M.G. Bridge FBA, Oxford University Press.
2. Ewan McKendrick (General Ed.), *Sale of Goods*, London, LLP, 2000.

D

3. Paul Mitchell, *Implied Terms as to Quality and Sample, Sale of Goods*, LLP, London, 2000 (*supra*).
4. Abdul Majid Nabi Baksh and Krishnan Arjunan, *Sale of Goods Law in Malaysia*, Sweet & Maxwell, 2016, para. 3.084.

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5. *Benjamin's Sale of Goods*, 9th edn, Sweet & Maxwell, 2014 at para. 11-075.

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